U.S. Department of Justice

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Washington, D.C. 20530

September 26, 1985

Edward J. Schwartz, Esq.
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Re: United States v. Reilly Tar & Chemical Corp.
no. 4-80-469 (D. Minn.)

Dear Ed:

Your letter of September 10, 1985 to Tim Butler invited a reply from all counsel in this proceeding, so I thought I would reply to your letter and Becky Comstock's letter of September 12, 1985 to Gary Hansen in order to make clear the United States' position on certain issues raised by Oak Park Village and by Hopkins in the Consent Decree negotiations.

A. Oak Park Village Issues

Your letter of September 10, 1985 responded to Tim Butler's letter of August 13, 1985 to Beth Thompson. Mr. Butler raised several issues. My responses will deal with the issues Mr. Butler raised and your comments on them.

(1) Oak Park Village wanted to add a paragraph to Part C.5 of the Consent to reflect an indemnity agreement between the City of St. Louis Park and Oak Park Village. In your letter, Ed, you suggested that Part C.5 also reference indemnity agreement between the City and the other defendants. The United States has no objection to either proposal as long as the descriptions of indemnity agreements are accurate. I understand that the City believes that Mr. Butler's proposed language is not accurate.

(2) Mr. Butler wishes changes in Part E to reflect that all defendants, not just Reilly, deny liability. As long as the Consent Decree is enforceable against a defendant, we have no objection to that defendant denying liability.

(3) Mr. Butler had several proposals concerning the access provision, Part P. First, Mr. Butler wanted some provision under which his client would be consulted prior to any action being taken on its property and would have an opportunity to participate in the decision as to which remedial measures would be performed. Also, Mr. Butler wished his client to have the right to resort to dispute resolution under Part I if disputes arise over access provisions. We believe the second enclosure to your September 10, 1985 letter adequately satisfies Mr. Butler's concern and we would support that addition.

Second, Mr. Butler proposed a provision which would permit one of the property owner defendants to seek compensation for economic loss sustained by the property owner in connection with remedial measures performed on the property. The language proposed by Mr. Butler would provide that the property owner could sue the person obtaining access in this court. Mr. Butler's language also may suggest that the property owner defendants may sue for economic loss in connection with the remedial measures which they themselves undertake on their property under section 11 of the RAP. In your letter, Ed, you point out that Reilly has committed to restoring any property to which it has obtained access, but you say that Reilly refuses to accept liability for economic loss sustained by the property owner defendants and suggest that the United States and the State should be responsible.

This issue appears to be a tempest in a teapot. None of the parties expect any of the remedial measures undertaken to cause any significant interference with the property owner defendant's use of their property. The remedial measures contemplated would be likely to involve the installation of small monitoring or pumping wells. The only other relief specifically requested of the property owners is that they properly dispose of any contaminated soil which they may dig up in undertaking their own construction activities at the site. Moreover, each property owner would have the option of resorting to the dispute resolution provisions before a remedial measure was implemented if it believed that the proposed measure could be performed in a way that would create less of a hardship to the property owner. Therefore, the property owners would have an adequate means of taking action to minimize economic loss.

In any event, the United States cannot agree to be responsible for the property owners' claims for economic loss. In our view, the property owner defendants are liable under section 107(a)(1) of CERCLA, 42 U.S.C. §9607(a)(1), as current

owners and operators of facilities at which there has been a release of a hazardous substance. Therefore, each of these defendants could be held legally responsible for the costs of remedial measures taken on their property. Rather than impose these costs on the property owner defendants, we are willing to settle with them if they will allow others to perform these remedial measures on their property. In other words, we are offering an extremely favorable settlement to these parties. To ask the taxpayers to pay for economic losses substained by these parties due to actions performed on their property to protect the public health and environment, when they themselves could be required to perform these actions, is unfair and inconsistant with CERCLA. * /

However, the property owner defendants may have valid claims against Reilly for contribution under CERCLA. The doctrine of contribution allows joint tortfeasors to sue each other to apportion the costs of making the plaintiff whole. Since Reilly is responsible for the contamination of the other defendants' property, they may have a right to seek compensation for any economic loss they may have suffered from Reilly.

Third, Mr. Butler wished to change the provision in Paragraph P which referred to a 90 day notice period before any property owned by the defendants would be conveyed to reduce the notice period to 30 days. The United States will accept the language in item 6 of your letter which reflects that change.

(4) Mr. Butler wished changes in Part R which would preserve Oak Park Village's alleged right to seek future response costs for remedial measures against other parties, including EPA. We have no objection to preserving whatever claims Oak Park Village may have for future response costs against Reilly, since Oak Park Village may have colorable claims against Reilly under CERCLA. But Oak Park Village has no colorable claims against EPA for response costs, since EPA is not a liable party under CERCLA. Moreover, the United States has offered to settle both its past and future claims for response costs against Oak Park Village without payment from that party. If Oak Park Village is so concerned about maintaining its alleged claims for future response costs against the United States, then the United States should retain the right to seek future response costs against Oak Park Village.

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* / Moreover, even if the property owners' claims for "economic loss" against the United States had any legal basis, jurisdiction would only lie in the Claims Court. 28 U.S.C. §1491.

(5) In his letter, Mr. Butler proposed an addition to Part U of the Consent Decree, consisting of three sentences. The first sentence deals with the cross claims raised by the property owner defendants against other parties. Since the United States is not a party to these cross claims, we have no concern with respect to this sentence. The second sentence would preserve a variety of alleged claims, including claims for response costs and economic loss, by the property owner defendants against other parties, including EPA. For the reasons stated earlier in this letter we cannot agree to that sentence. The last sentence deals with claims brought by third parties. Mr. Butler's proposal would preserve the rights of the property owner defendants' to sue other parties to the Consent Decree, including EPA, if they are sued by third parties.

I understand that Mr. Butler wishes to preserve the alleged right to sue EPA for failing to close down Reilly when it was operating if Oak Park Village is itself sued by someone who alleges that he was injured by Reilly's operations. This position ignores the fact that Reilly closed its plant in 1972, while EPA was not created until 1971 and did not have the power to regulate waste disposal practices until 1976. It also ignores the fact that such claims would be barred under the Federal Tort Claims Act.

Nonetheless, in an effort to promote settlement, the United States would agree to a provision that would preserve the rights of all the parties to seek relief against each other in the event any one of them is sued by a.third party and preserve all defenses against such suits as well as the right to implead any other Party. We would propose the following language, based on language used by Becky Comstock in her letter to Gary Hansen of September 12, 1985:

> Part U shall not resolve the rights and defenses of or among the Parties with respect to unasserted claims which may be subsequently brought by a person not a Party to this Consent Decree against any Party to this Consent Decree. Nothing herein is intended to abrogate the doctrine of sovereign immunity, the doctrine of discretionary immunity, the Federal Tort Claims Act or the Minnesota Tort Claims Act.

We believe that this language fits more appropriately at the end of Part S (Other Claims) on page 60, rather than in Part U. It should be noted that this language preserves the United States' right to implead Reilly in third party actions.

(6) Mr. Butler requested a change in section 11.4.3(A)(5) of the RAP to allow Oak Park Village to replace contamination soils removed for minor excavations if covered with clean soil. The first attachment to your letter is satisfactory.

B. Hopkins Issues

I must comment on two points raised in Becky Comstock's letter to Gary Hansen:

(1) We have no objection to adding Hopkins to the reopener provisions of Part U.5, U.6 and U.8.

(2) Reilly's suggestion that the State, and even the United States, is responsible to Hopkins for its response costs is absurd. It is clear that the source of contamination of Hopkins well 3 is the coal tar material which Reilly allowed to be deposited in Well 23. Therefore, Reilly would be responsible to Hopkins under section 107 of CERCLA for response costs consistant with the National Contingency Plan. Reilly's argument seems to be that the State is responsible to Hopkins because it advised St. Louis Park to close certain wells in order to protect the public from drinking contaminated water and by doing so eliminated pumping stresses which kept the contaminated water away from Hopkins 3. This argument ignores the fact that it was Reilly who contaminated the groundwater to begin with; it also suggests that the State should have let people drink contaminated water. Finally, how the United States would be responsible under this absurd theory is unfathomable since the United States had no involvement in closing the wells. Rather than rely on such absurd arguments, Reilly might move this case closer to settlement if it dealt fairly with Hopkins' legitimate claim and modest settlement figure.

Sincerely yours,

Assistant Attorney General
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